note and the deposit of titles by way of collateral security. The plaintiff sued the defendant upon the promissory note for the unpaid balance of the loan only and this suit was dismissed by reason of limitation. The plaintiff then brought a second suit for an order under section 78 of the Registration of Titles Regulation "enabling me to enforce payment of the sum charged upon immovable property."

In dismissing the suit Innes, J.C., said :—

"Plaintiff is precluded from bringing this suit by the terms of section 33 (now section 29) of the Civil Procedure Code. The case **Gumani v. Ram Paderath Lal**, I.L.R. 2 All. p. 838, cited by Mr. Day in argument confirms this, if, indeed, any confirmation is needed in view of the very clear wording of sub-section (iv) of section 33 of the Code as to the disability of a plaintiff to sue first on a personal obligation and then on collateral security for the same sum."

That case was decided in 1908 and in amplification of what is said there I would quote the following passage from the judgment of Lord Moulton in the later Privy Council case of *Payana Reena Saminathan & Anor. v. Pana Lana Palaniappa*[2] regarding section 34 of the Ceylon Civil Procedure Code which is the same as our section 29 :—

"It is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph, in their Lordships' opinion, is not intended to be an illustration of the foregoing provisions, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the section."

In view of the authorities, I have no option but to dismiss the application. It is beside the point that it is made by way of originating summons. I agree that it should have been made by way of suit but that is a mere technicality. Whether it be made by originating summons or by way of suit, I am satisfied that it should be dismissed on the ground that the applicant should have claimed the relief he now claims in Civil Suit No. 122 of 1952.

Application dismissed.

TAN BOK KEE v. REGINA.

[A. Cr. J. (Brown, Ag. C.J.) October 21, 1953]

[Singapore — Magistrate's Appeal No. 142 of 1953]

Road Traffic — Motor Vehicles (Construction & Use) Rules, 1948, r. 95 — Testing and accuracy of weighing machine.

It is essential that weighbridges of weighing machines which are to be used for the purpose of testing laden weight of heavy motor cars should be regularly tested, and there must be some evidence from which their accuracy can be either proved or presumed.

When persons are charged with offences relating to overweight or underweight there must be some evidence to prove that the machine, which records the weight alleged by the prosecution, is accurate, or some evidence from which its accuracy can be presumed.

Case referred to :—

(1) *Sim Ah Man v. Public Prosecutor* (1949) M.L.J. 21.

MAGISTRATE'S APPEAL.

P. F. de Souza for the appellant.

G. S. Hill (Crown Counsel) for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Brown, Ag. C.J. : — The appellant was convicted of contravening Rule 95 of the Motor Vehicles (Construction & Use) Rules, 1948, by conveying bags of flour in a motor lorry when the weight transmitted by the rear wheels in line transversely was 7 tons 2 cwts. and 1 quarter, such weight being in excess of 6 tons which the maximum weight permitted by that Rule.

The case for the prosecution rested upon the evidence of an acting Sergeant of the Traffic Police who, suspecting the lorry to be carrying excess weight, told the appellant to take it to a weighbridge belonging to the City Council. There he first weighed the lorry with all four wheels on the weighbridge, and found the weight to be within the permitted weight for four wheels. Then he weighed it with the two rear wheels on the weighbridge and found the weight to be one ton 2 cwts. and 1 quarter in excess of the weight permitted for two wheels. No certificate of weight was given by the clerk in charge of the weighbridge either to the witness or to the appellant. I fully accept the observations which the learned Magistrate made about this witness in his Grounds of Decision, from which it follows that I accept the fact that the weight which was registered by the dial when the two rear wheels were on the weighbridge was the weight which was deposed to by the witness and which was stated in the charge. According to the machine, the weight on the two rear wheels exceeded the permitted weight.

But there was no evidence that the witness was a "police officer authorized in writing" to require the the appellant to allow his lorry to be weighed, as required by sub-section (1) of section 39 of the Road Traffic Ordinance, 1941. And the provisions of sub-section (3) of that section (which requires a certificate of weight to be given to the appellant) were not complied with.

On behalf of the respondent I have been asked to make two presumptions. Firstly, I am asked to presume that the witness was "a police officer authorized in writing in that behalf" under sub-section (1) of section 39 of the Ordinance. But when a police officer is entitled to exercise a certain power only if he is authorized in writing in that behalf it is incumbent upon him to satisfy the Court that he was so authorized and to produce the evidence of his authority. Nevertheless absence of evidence that he had authority to require the appellant to allow his vehicle to be weighed under the provisions of section 39(1) might not have been fatal to this conviction if there had been evidence that the weight recorded by the dial was in fact the true weight. And here I was asked to make the second presumption: namely that the weight recorded by the dial should be presumed to be the correct weight. In this connexion I must express my disagreement with the learned Magistrate when he says that "the clerk in charge of the weighbridge could not even be considered as a material witness as he might or might not have been present at the time the weighing was done." The importance of the evidence would have been that he, as the man in charge of the weighbridge, could have given evidence of its accuracy and could have informed the Court when it was last tested. The onus is upon the prosecution to prove that what they allege to be the weight is in fact the correct weight. It is therefore essential that weighbridges or weighing machines which are to be used for this purpose should be regularly tested, and that there should be some evidence from which their accuracy can be either proved or presumed. If a certificate had been put in that this weighbridge had been tested on a certain date and found to be correct, it might have been possible to presume that it was correct on the day in question. But here there was no evidence at all which related to the accuracy of this weighbridge, from which a Court could presume that the weight recorded by the dial was correct.

I have no doubt that if the learned Magistrate had been referred to the Johore case of *Sim Ah Man v. Public Prosecutor*[1] he would have come to a different conclusion. The following passage from the judgment of Laville, J. appears to me to set out the correct view of the matter, and I would respectfully adopt it for the purpose of this appeal:—

"As the whole foundation of the prosecution case in charges of over-weight or under-weight depends on the accurate and proper functioning of the machines used to estimate it, it appears reasonable that it should be part of the onus thrown on the prosecution to prove that what they allege to be the weight is the correct weight. In order to do this it is necessary to prove that the methods employed to ascertain it, whether mechanical or otherwise, are accurate when tested by the standard weights of the country. Once the machines and the weights are certified as correct, or proved to be correct, the Court may under section 114 of the Evidence Enactment presume the continuance of correctness for a reasonable period until the presumption is rebutted by the accused."

A distinction was sought to be drawn between that case and the present case in that in the Johore case the machine in question was a weighing machine which was kept in a Police Station and in the present case it is a weighbridge which is the property of the City Council. I know of no reason for making a distinction, and it seems to me that the passage which I have quoted is equally applicable to both. The point is that when persons are charged with offences relating to overweight or underweight there must be some evidence to prove that the machine, which recorded the weight alleged by the prosecution, is accurate, or some evidence from which its accuracy can be presumed. Here there was none.

The appeal is allowed and the conviction and sentence quashed.

Appeal allowed.

BERENGER v. ROZARIO (m.w.).

[O. C. J. (Whitton, J.) July 1, 1953]

[Singapore — Suit No. 1033 of 1952]

Contract —Illegal and immoral contract — Motor car — Conversion — Immoral association — Public policy.

As a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.

[**Editorial Note:** — No action can be brought for the purpose of enforcing an illegal contract either directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it. Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such a case the maxim **In pari delicto, portior est conditio defendentis** applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party. Halsbury 2nd Ed. Vol. VII p. 173.]

Case referred to:—

(1) *Bowmakers Ltd. v. Barnet Instruments Ltd.* (1945) 1 K.B. 65; (1944) 2 All E.R. 579.